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91-1732

Supreme Court, U.S.
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NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

THE PEOPLE OF THE STATE OF MICHIGAN,
PETITIONER
v
MARTIN HOWARD SAMMONS,
RESPONDENT

THE PEOPLE OF THE STATE OF MICHIGAN,
PETITIONER
v
ALAN MICHAEL STONE,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF MICHIGAN

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER THE 6TH AMENDMENT "CONFRONTATION CLAUSE" APPLIES TO PRETRIAL HEARINGS?

2. WHERE TESTIMONY AT A PRETRIAL HEARING SHOWED THAT ONE OR MORE DEFENDANT CHARGED WITH POSSESSING A POUND OF COCAINE WITH INTENT TO DELIVER, AND CONSPIRACY TO DELIVER COCAINE, HAD OFFERED TO PAY TO HAVE AN "INFORMANT" WITNESS KILLED AND A PART OF HIS BODY BROUGHT TO THE DEFENDANT, AND THE TESTIMONY ALSO SHOWED THAT THE DEFENDANTS HAD FORGOTTEN WHAT THE "INFORMANT" LOOKED LIKE, MAY THE TRIAL JUDGE ALLOW THE "INFORMANT" WITNESS TO WEAR A SKI MASK WHILE TESTIFYING AT THE PRETRIAL HEARING SO THAT THE DEFENDANTS AND OTHERS PRESENT IN THE COURTROOM CANNOT SEE THE WITNESS'S FACIAL FEATURES WITHOUT

VIOLATING THE 6TH AMENDMENT'S CONFRONTATION CLAUSE?

3. WHETHER, IN A PROSECUTION FOR POSSESSION WITH INTENT TO DELIVER OVER 225 GRAMS OF A MIXTURE CONTAINING COCAINE, MAY A TRIAL JUDGE, CONSISTENT WITH THE 6TH AMENDMENT'S "CONFRONTATION CLAUSE" AND THE 14TH AMENDMENT'S "DUE PROCESS CLAUSE", PRECLUDE CROSS EXAMINATION AT A PRETRIAL HEARING THAT MIGHT REVEAL THE IDENTITY OF THE WITNESS, WHERE THE DEFENSE HAD BEEN SUPPLIED WITH A LIST OF THE WITNESS'S CRIMINAL CONVICTIONS, AND WHERE THE DEFENSE ATTORNEYS HAD BEEN GIVEN AN OPPORTUNITY TO TALK WITH AND QUESTION THE WITNESS PRIOR TO THE PRETRIAL HEARING, WHERE TESTIMONY SHOWED THAT DEFENDANTS HAD FORGOTTEN WHAT THE WITNESS LOOKED LIKE, AND WHERE THE TRIAL JUDGE CONCLUDED THAT SUCH A

PROCEDURE WAS NECESSARY DUE TO STATEMENTS BY ONE OR MORE DEFENDANT THAT COCAINE WOULD BE PAID TO A PERSON WHO KILLED THE WITNESS AND DELIVERED A BODY PART OF THE WITNESS TO THE DEFENDANT?

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v
ALAN MICHAEL STONE,
RESPONDENT

**PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF MICHIGAN**

NOW COME the People of the State of Michigan, by George B. Mullison, Prosecuting Attorney for the County of Bay, Martha G. Mettee, Assistant Prosecuting Attorney, Chief of Training and Appeals, and Richard I. Dresser, Assistant Prosecuting Attorney, Director, Career Offender Unit, and pray that a writ of certiorari issue to review the judgments of the Court of Appeals of the State of Michigan entered in the above-entitled matters on October 7, 1991 in People v Sammons, and on October 3,

1991 in People v Stone, leave to appeal denied by the Michigan Supreme Court February 7, 1992 in Sammons, and on January 29, 1992 in Stone.

OPINIONS BELOW

The order of the Michigan Court of Appeals in People v Sammons is a reported opinion at 191 Mich App 351; 478 NW2d 901 (1991) and is appended as Appendix A. The order of the Michigan Supreme Court is reported at 439 Mich 933 (1992), and is appended as Appendix B.

The order of the Michigan Court of Appeals in People v Stone is unreported and is appended as Appendix C. The order of the Michigan Supreme Court is reported at 439 Mich 917 (1992), and is appended as Appendix D.

STATEMENT OF JURISDICTION

Both cases involve identical questions and are joined in a single petition pursuant to Rule 12.2.

The judgments of the Court of Appeals of the State of Michigan were entered in the above-entitled matters on October 7, 1991 in People v Sammons, and on October 3, 1991 in People v Stone. The orders of the Michigan Supreme Court were entered on February 7, 1992 in Sammons, and on January 29, 1992 in Stone.

The jurisdiction of this Court is invoked under 28 USC { 1257 (3).

CONSTITUTIONAL PROVISION INVOLVED

Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

Fourteenth Amendment: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . ."

STATEMENT OF THE CASE

Both defendants were charged together with a third co-defendant in a joint Information with the crimes of possession with intent to deliver between 226 grams and 650 grams of a mixture containing the controlled substance cocaine and conspiracy to deliver between 226 grams and 650 grams of a mixture containing cocaine. They claimed that they were entrapped.

Michigan follows the minority view of entrapment (the "objective" test), holding that it is a question of law to be determined by the trial court at a pretrial hearing. The burden of proof is on the defendant, and he must prove entrapment by a preponderance of the evidence. The issue of entrapment is not presented to the jury.

A pretrial entrapment hearing was held before the trial court judge, William J. Caprathe. Following the

presentation of proofs by the defendants, the prosecution presented testimony by an informant called "Rick". "Rick" is the person who, in cooperation with the police, made arrangements for the defendants to come to Bay City, Michigan to sell one pound of cocaine for $14,500.00.

When "Rick" was called to testify he came into the courtroom and took the witness stand wearing a ski mask so that his facial features could not be seen. Counsel for the defendants objected, and a hearing was eventually held to determine whether "Rick" should be allowed to wear the mask, and whether the Court should preclude the defense from asking any questions on cross examination that might lead to the discovery of "Rick's" identity. Testimony was presented to show that the defendants did not remember what "Rick" looked like:

> "Q: Officer Buczek, have you overheard comments by the

defendants regarding the identity of the defendant--er, I'm sorry, the identity of the informant?

A: Yes.

Q: And can you tell us what you've overheard in terms of their conversations?

A: Last week, we had a witness from the phone company up here. And when he was seated in the hallway, Mr. Wallace, particularly, took quite a bit of attention - starin' at him; and then once we were in the courtroom, all three of 'em, when I brought the witness in, kept sayin', "Yeah, I think that's him," "That's him," "That looks like him," for quite a bit of time while he was seated in here.

* * *

Q: When Officer Chambers came into the--there came a time when Officer Chambers came into the courtroom later that day; is that correct?

A: Yes.

Q: Were there any comments when Officer Chambers came into the courtroom?

A: Yes.

Q: And what were--what comments were there when Officer Chambers came into the courtroom?

A: The three defendants were again together and they seemed to indicate that Officer Chambers was--

* * *

A: Officer Chambers came in and was seated in the chair by the door. I believe Mr. Stone looked at him and said, "Is that him?" addressing the

> other two defendants. Mr. Sammons said, "I don't know if that's him or not" and he made reference to "I've been clean for five months, I was up for five days the night--"
>
> * * *
>
> A: . . . Mr. Sammons made a comment that he didn't know if that was the informant or not. He said, "It was five months ago, I've been straight for five months; at the time I was up here, I'd been up for five days, I don't know if that's him or not." (E.Hrg., 5-10-88, p. 5-10.)

Testimony was also presented by a second confidential informant who was a prisoner in the Bay County Jail, along with the third co-defendant, James Wallace. (Mr. Wallace's case is not involved in this petition as the Michigan Court of Appeals ruled that he did not

have standing to claim entrapment, and his plea based conviction was affirmed.) According to Informant #2, Wallace called defendant Stone (who was free on bond) from the jail and talked to Stone. Following this conversation, Wallace told Informant #2 that Stone would pay "QP", which means a quarter pound of cocaine, "to have Rick killed and have a part of his body brought to him." In response to a question about what Wallace had told Informant #2 about his conversation with Stone, Informant #2 stated:

> "He said that Rick's testimony wasn't really was - what was hurten' him, that Officer Buczek's was the one he was really more concerned about, not Rick's. But if I had Rick taken care of and brought him his dick, that he would give me the QP any way." (E.Hrg., 5-10-88, p. 127.)

At the conclusion of the hearin relating to the issue of whether "Rick could wear the ski mask while testifying, and whether the defense should be precluded from cross-examining "Rick" in areas that might lead to disclosure of his identity, Judge Caprathe ruled as follows:

> "THE COURT: All right, the Court has given consideration to the arguments and to the testimony and as far as the issue of disclosure of the informant is concerned, I believe that this is a preliminary question and, of course, I'm not sure and I don't think it matters about trying to compare the standards between trial and a motion to suppress. It isn't either actually, it's somewhere in between the two I would say, but the point is I

think that it's a preponderance of the evidence test - preliminary evidentiary question; and it's certainly not a reas--beyond a reasonable doubt test which would be required for a conviction regarding the behavior that's been alleged.

I think you have to take a look at all the factors and then determine whether or not there's a preponderance of the evidence that it would be necessary to preclude the disclosure to deal with the potential adverse safety affect on the witness that's testifying; but is asking to not have his identity disclosed.

You look at the large quantity of drugs that are involved in the charge, the

am--large amount of money, the long potential prison terms, possibly some of it being mandatory depending upon which statutes are applied.

The fact that there is the testimony of the second confidential informant and if you weigh all that on the one hand I think you see a potential safety problem for the witness; on the other side, the need for the information.

Apparently the prosecutor has already shared the record of this individual, and would share any other information which wouldn't result in disclosing the identity such as any work that he's done with the police, that can be done on cross examination and that hasn't been precluded.

The only thing we have precluded were questions that would lead directly to the identity, and thus the safety of the individual; and weighing all of those factors, I -- it would appear to the Court that there is a preponderance of the evidence weighing in favor of not disclosing the witness' identity any further than it already has been and allowing him to complete his testimony with the mask on and limiting the questions to those that do not disclose the actual identity of the individual; but questions such as what he's doing and what he has been doing, or arrangements that have been made and that sort of thing, will have to be asked and unless there's an

> objection that it would disclose identity then they will be permitted and I'll deal with those on an individual question to question basis." (emphasis added) (E.Hrg., 6-7-88, p. 26-28.)

At the conclusion of the entrapment hearing, the court found that the defense had not proven entrapment.

Defendant Sammons was convicted following a jury trial. The informant "Rick" was not called as a witness at trial.

Defendant Stone entered a plea of guilty to the charge of possession with intent to deliver between 226 grams and 650 grams of a mixture containing the controlled substance cocaine. The charge of conspiracy was dismissed.

Both defendants appealed to the Michigan Court of Appeals. That court determined that "the protections afforded

by the Confrontation Clause were available to defendant at the entrapment hearing as a means of ensuring the reliability of the evidence submitted against him." The court also concluded that "Because the masking of the prosecution's chief witness precluded the trial judge from adequately observing the witness' demeanor when testifying, we are constrained to find that the procedure of masking denied defendant a critical aspect of his confrontation rights." In addition, the court concluded that "it was a violation of defendant's confrontation rights to completely preclude disclosure of identifying information." Accordingly, the court remanded the cases to the trial court for a new entrapment hearing.

The People sought leave to appeal to the Michigan Supreme Court which denied leave, with three of the seven Justices dissenting.

The People now seek certiorari.

REASONS FOR GRANTING THE WRIT

This case is important because it may well have a profound effect upon the government's ability to fight the war against illegal drugs. Due to the nature of drug offenses, it is often necessary to utilize informants, or "cooperating individuals", to infiltrate drug networks or set up transactions. However, due to the large amounts of money involved and the potential for very long prison sentences upon conviction, the lives of the cooperating individuals are sometimes in jeopardy. This case presents one method of dealing with this problem, while still assuring that the rights of the defendants are maintained.

"Rick", a confidential informant, was reluctant to testify due to fear of reprisals, yet, while his testimony was not necessary at trial, it was necessary at a pretrial entrapment hearing, since he was the person who had direct contact

with defendant Sammons in setting up the delivery of a pound of cocaine. (In Michigan, entrapment is a question of law to be decided by the trial court, and it does not become a question for the jury at trial.) Furthermore, the police had become aware of a desire by one or more of the co-defendants to have "Rick" killed. Therefore, it was decided to have "Rick" wear a ski mask during his testimony so that the defendants and others in the courtroom would not be able to see what he looked like. For the same reason the People objected to any cross-examination questions that might lead to determining "Rick's" identity. However, the defense was provided with information relating to "Rick's" criminal history, as well as information relating to any deals made between "Rick" and the police. Furthermore, an opportunity was provided to the defense attorneys to question "Rick" in advance of the entrapment hearing. Only the attorney

for defendant Stone took advantage o this opportunity, and his conversatio with "Rick" was tape recorded by the police so as to preserve it for future use if that became necessary. The fact that "Rick" was not a necessary trial witness is demonstrated by the fact that neither side called him to testify at the trial of defendant Sammons. The People did not need his testimony in order to gain a conviction, and the defense apparently determined that his testimony would not be helpful.

It is the People's position that the right to "confrontation" is a trial right. Barber v Page, 390 US 719; 88 S Ct 1318; 20 L Ed 2d 255 (1968); California v Green, 399 US 149; 90 S Ct 1930; 26 L Ed 2d 489 (1970); Pennsylvania v Ritchie, 480 US 39; 107 S Ct 989; 94 L Ed 2d 40 (1987). However, we recognize that in Ritchie, only a plurality of the Court agreed with this position, and that in Kentucky v Stincer, 482 US 730; 107 S

Ct 2658; 96 L Ed 2d 631 (1987), Justice Blackmun, writing for the Court, expresses his personal view that the confrontation right "is somewhat broader than that of the Ritchie plurality". Stincer, ftnt 9. In Stincer, the Court chose not to determine whether a hearing held after trial had commenced, but held outside the presence of the jury, to determine whether a child witness was competent to testify was a trial or pretrial proceeding.

The Michigan Court of Appeals felt that:

> "to deny the protections afforded by the Confrontation Clause to a defendant at an entrapment hearing would be to deny him the opportunity to ensure that the evidence presented against him, which may defeat his claim of entrapment and remove any impediment to a subsequent

> trial and conviction, 'is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-Americal criminal proceedings.' Craig [Maryland v Craig] 497 US at ___; 110 S Ct at 3163; 111 L Ed 2d at 678-679. Finally, we believe it would be fundamentally unfair, and contrary to principles of due process, to allow the state to present evidence designed to defeat defendant's claim of entrapment and at the same time restrict the defendant's ability to effectively examine the reliability of such evidence." Sammons, 191 Mich App at 361-362; 478 NW2d at 907.

However, even if the Michigan court is correct in its conclusion that the

Confrontation Clause is applicable to pretrial hearings, the People believe that the court is dead wrong in its conclusion that the defendants' rights were violated!

First, "Rick" did testify at the entrapment hearing, and he was subject to full, complete and rigorous cross examination, subject only to the limitation that questions that might reveal his identity could not be asked. This limited restriction on cross examination was imposed only after the trial judge conducted a hearing and determined that the evidence regarding the threats against the witness's life necessitated such a ruling. Thus, the procedures utilized at the hearing fall with the ambit of the Confrontation Clause:

> "The Court has emphasized that 'a primary interest secured by [the Confrontation Clause] is the right of cross-

> examination.' Douglas v Alabama, 380 US 415, 418; 85 S Ct 1074; 13 L.Ed.2d 934 (1965). The opportunity for cross-examination, protected by the Confrontation Clause, is critical for ensuring the integrity of the fact-finding process." Stincer, 482 US at 736; 96 L Ed 2d at 641.

Second, the "face-to-face", "look me in the eyes" aspect of confrontation was present, since "Rick" testified in an open courtroom, in the presence of the three co-defendants. The ski mask did not block the view of the witness. All that was masked were his facial features.

Third, while the Michigan Court of Appeals felt that the inability of the trial court judge to see the face of the witness was a major factor, apparently feeling that credibility cannot be determined without being able to view the witness's facial features, this emphasis

on the need to watch a witness's face is misplaced.

At the entrapment hearing the witness, "Rick", testified in the presence of the defendants, their attorneys, the prosecutor, the judge, and the spectators present in the courtroom. He wore a ski mask that had eye holes. He was able to see and be seen. The only thing that was not visible were his facial features.

While Petitioner recognizes that we all like to see the people we talk to, and that we may think that we can pick up hints regarding whether someone is telling the truth or not from facial expressions, in reality this is not an accurate method of determining credibility. We all know that there are people who can lie with a straight face. We know that there are people who tell the truth, but when nervous they do not look you in the eye when talking. We know that there are people who lie while

they look you straight in the eye. We know that out of nervousness some people laugh or smirk when telling the truth, and other people may laugh or smirk when fabricating. In other words, what does a poker face or any other facial expression mean? No one, not the Michigan Court of Appeals nor the defendants have cited any scientific study or theory which suggests that certain facial expressions mean that a person is telling the truth or telling a lie. Since the meaning of one persons facial expression may or may not be the same as the next person's facial expression, what was lost by allowing the witness to testify while wearing a mask?

In pretrial hearings, or at bench trials, judges are expected to make detailed findings to support their legal conclusions. In order to make the necessary findings, most judges take detailed written notes while witnesses are testifying. It is not possible for a judge to study the facial expressions of

a witness while at the same time taking detailed written notes. Furthermore, the physical arrangement of the courtroom in many instances precludes the judge from studying the facial expressions of witnesses while they testify. In many courtrooms, as was the situation in the instant case, the judge sits slightly above and to the side of the witness. While the judge would be able to see the side of the witness's face, depending on which way the witness was looking, the judge would by no means have a clear view of the witness's entire face.

Furthermore, the view of the Michigan Court of Appeals can be read to preclude blind people, from sitting as jurors or from serving as fact-finders, since blind people would have no way of observing any of the facial features of a witness. Should we tell all of the blind trial court judges around the country that they are not qualified to be judges in a trial court and send them off on full

disability retirement? Should we tell blind lawyers to forget about seeking judicial positions in the trial courts because they are not qualified to judge the credibility of a witness and therefore cannot properly fulfill the role of being a trial court judge? Should we tell the blind citizens of our nation that they are not qualified to fulfill one of the most solemn roles a citizen can be asked to perform, that of a juror? Finally, should we tell the blind criminal defendant that he or she has a right to be tried by a jury of his or her peers, so long as they are not peers who are blind? A reading of the decision of the Michigan Court of Appeals would require an affirmative answer to each of these questions!!

The reasons for seeking review of the decision of the Michigan Court of Appeals are perhaps best phrased by Michigan Supreme Court Justice Patricia Boyle in her dissent from the denial of leave to appeal to the Michigan Supreme Court:

"I dissent from the order and would grant leave to appeal to determine whether the masking of a witness who testified under oath, in defendant's presence and subject to cross examination violated defendant's right to confrontation where it is clear that the identity of the witness was known to the defendant since defendant claimed entrapment by the witness. The Court of Appeals concluded that the Confrontation Clause applies fully to an entrapment hearing despite the irreducible literal meaning of the clause: "'a right to meet fact to face all those who appear and give evidence at trial, " Coy v Iowa, 487 US 1012, 1016 (1988), quoting California v

Green, 399 US 149, 175 (1970)(Harlan J., concurring).

Moreover, it is well established that the Confrontation Clause reflects a preference for face-to-face confrontation, and thus a defendant's right physically to face those who testify against him is not absolute, even when it encompasses the irreducible literal meaning of the clause, Green, supra; Dutton v Evans, 400 US 74 (1970); Bourjaily v United States, 483 US 171 (1987). As the Supreme Court observed in Maryland v Craig, 497 US ___; 110 S Ct 3157, 3165; 111 L Ed 2d 666 (1990):

'Given our hearsay cases, the word 'confront,' as used in the Confrontation Clause, cannot simply mean

face-to-face confrontation, for the Clause would then, contrary to our cases, prohibit the admission of any accusatory hearsay statement made by an absent declarant--a declarant who is undoubtedly as much a 'witness against' a defendant as one who actually testifies at trial.'

To be sure, the elements of face-to-face confrontation encompass oath, cross-examination, and observation of the witnesses' demeanor. The Court in Craig, however, upheld a procedure which preserved all of the other elements of the right, but prevented a child witness from seeing the defendant as the witness testified at trial. The test is whether the procedure employed 'adequately

ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony.' Maryland v Craig, supra, 110 S Ct 3166.

In the instant case, assuming that the entrapment hearing was a trial for purposes of confrontation analysis, see Kentucky v Stincer, 482 US 730 (1987), the only element of Confrontation Clause analysis that the procedure had an effect on was the trial court's ability to see the face of the witness. Defendant was present, the witness was subjected to cross-examination under oath, and there was confrontation in

the literal sense. The opinion of the Court of Appeals is published and may have significant consequences for the protection of informant witnesses, as well as for the development of other innovative procedures which the state is able to demonstrate are necessary to further an important state interest." (emphasis added)

CONCLUSION

WHEREFORE, the Petitioner requests that plenary review be granted.

Respectfully submitted,

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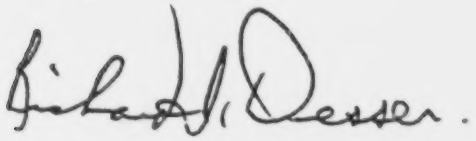

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APPENDIX A

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTIN HOWARD SAMMONS,

Defendant-Appellant.

October 7, 1991
9:10 a.m.

No. 115051

Before: MacKenzie, P.J., and Reilly and Connor, JJ.

REILLY, J.

Defendant was convicted by a jury of possession with intent to deliver 225 grams or more, but less than and (sic) 650 grams, of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii), and conspiracy to deliver 225 grams or more, but less than 650 grams, of cocaine, MCL 750.157a; MSA 28.354(1). On September 6, 1988, defendant was sentenced to a term of twenty to thirty years of imprisonment for each offense, to be served consecutively. On March 27, 1989, this

Court granted the defendant's application for a delayed appeal. We remand for proceedings consistent with this opinion.

At trial, Officer Buczek of the Bay City Police Department testified that on December 4, 1987, he and a police informant went to the Imperial Hotel in Bay City, Michigan, for the purpose of buying one pound of cocaine. Buczek and the informant were admitted into a hotel room by defendant, who was accompanied by codefendants Alan Stone and James Wallace. Defendant told the informant that the "shit" was in the bathroom. While the defendant and the informant went into the bathroom, Buczek remained in the room with Stone and Wallace, who discussed the problems associated with obtaining such a large quantity of cocaine. After defendant and the informant came out of the bathroom, defendant gave the informant a "sample" from a small pile on a night stand. The informant tasted the sample and indicated

that it was "good." Buczek then told defendant the money was in the car. Defendant pointed to Stone and said, "[H]e's the money man." Stone told Buczek to get the money, which he did. Defendant commented that he hoped the bills were not little. After Stone counted the money, Wallace went outside to get "the product." Defendant told Buczek "[W]e don't like to keep the coke and the money in the room at the same time."

After Wallace left the room, other police officers arrived and the suspects were arrested. Wallace was arrested after entering a van parked outside the hotel room. A warrant was secured to search the van, and the police discovered a sealed package under one of the seats. This package, along with the material from the night stand, and a packet that was seized from Stone were turned over to the Michigan State Police for testing. Analysis of the materials indicated that

all three contained cocaine. Defendant, Wallace, and Stone were all charged with conspiracy to deliver 225 grams or more, but less than 650 grams, of cocaine, and possession with intent to deliver 225 grams or more, but less than 650 grams, of cocaine.[1]

Defendant, along with Wallace and Stone, raised the issue of entrapment before trial, and extensive hearings were conducted from May 4, 1988, through June 7, 1988. Defendant testified and identified the informant who accompanied Officer Buczek during the drug sale as a person he knew merely as "Rick." Defendant claimed that Rick set up the drug sale and pressured him into participating. The prosecution called Rick to rebut the defendant's allegations. Over defendant's objection, Rick was permitted to testify while wearing a mask and without disclosing his true identity. Rick denied either pressuring or threatening defendant, and the trial court found no entrapment.

Codefendants Wallace and Stone eventually pleaded guilty of possession with intent to deliver 225 grams or more, but less than 650 grams, of cocaine in exchange for the dismissal of the remaining charges against them. The defendant, however, declined a similar plea offer, electing instead to go to trial. At the subsequent trial, Rick was not called as a witness. Following trial, defendant was convicted by a jury of both counts as charged. This appeal followed.

Defendant on appeal has raised a host of issues addressing pretrial procedure, trial procedure, and sentencing. We will review each of them.

I

The first issue we have been asked to decide is whether the defendant's Sixth Amendment right of confrontation was violated when the trial court permitted Rick, the prosecution's chief witness, to testify at the entrapment

hearing while wearing a mask, and without disclosing his true identity.

The Confrontation Clause of the Sixth Amendment, made applicable to the states through the Fourteenth Amendment, Pointer v Texas, 380 US 400; 85 S Ct 1065; 13 L Ed 2d 923 (1965), guarantees to a criminal defendant the right, "[i]n all criminal prosecutions, . . . to be confronted with the witnesses against him." The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. Maryland v Craig, 497 US __; 110 S Ct 3157; 111 L Ed 2d 666 (1990).

A

At the entrapment hearing, defendant testified that he first met Rick at a "dope house" approximately eight months before he was arrested. Defendant claimed that until November 16,

1987, he saw Rick about once a week at various dope houses where they would "do" cocaine together. Beginning on November 16, defendant said Rick began telephoning him repeatedly, up to ten times a day, trying to persuade him to sell cocaine. At first Rick asked for two ounces, and then a pound. Defendant said he kept trying to put Rick off and told him that he didn't want to sell cocaine. Rick kept calling though, telling defendant that he had spent $1,500 "profit money," and that his people were "putting the heat on him." Further, defendant was told that if he did not help out, Rick would have his people "put the heat" on defendant. Defendant said he finally agreed to help because Rick was desperate and in trouble. Defendant said that although he was a cocaine addict, and knew people who "turn dope," he was not a drug dealer.

Defendant's sister corroborated defendant's testimony, claiming that Rick

called approximately seventy times during the last two weeks in November 1987. She said Rick called one time "hollerin'" that his people were upset because defendant had not shown up with two ounces of cocaine. He told her that defendant "better come through or else."

In rebuttal, the prosecution called Rick as a witness. At the prosecutor's request, and over defendant's objection, Rick was permitted to testify while wearing a mask, and defense counsel was instructed that he could not ask any identifying questions of Rick. The court, however, did allow admission of Rick's criminal record, but with identifying information struck therefrom. The justification for these procedures was that either defendant or one of his codefendants had allegedly offered someone a quarter pound of cocaine to kill Rick.[2]

According to Rick, beginning in October 1987, he and a friend made

several trips from Bay City to Detroit where they bought drugs from defendant's younger brother and then defendant. In mid-November, after Rick's fifth trip to Detroit, the police searched Rick's house and discovered cocaine. Although Rick was not arrested, he was given a card with a phone number to call at the police department if he wanted help with his "situation." Consequently, Rick contacted the police and volunteered to assist them in catching his suppliers. Rick said he called both defendant and another source, identified as "Jim," about arranging a delivery of two ounces of cocaine to Bay City. Although Rick thought defendant and Jim were working together, Jim delivered the drugs in late November without defendant. Rick then called defendant to arrange for a sale of one pound of cocaine. Rick said he made numerous telephone calls to arrange the deal.

According to Rick, there was never any resistance by defendant to the sale, and he never put any pressure on defendant, whether by threats or appeals for his own safety. Rick said he was in constant contact with the police and discussed each phone call with them. Officer Buczek testified that Rick was closely supervised through the use of in-person meetings and phone consultations. Although Rick testified that he was not promised anything for his cooperation, the prosecutor eventually stipulated that Rick was told that the police would inform the prosecutor of his cooperation, and that the more help he provided, the more they "could talk."

At the conclusion of the entrapment hearing, the trial court made extensive findings, reflecting acceptance of the testimony of Rick and the police. The court found that defendant had sold drugs to Rick before Rick's involvement with the police, that defendant had indicated

a willingness to deliver drugs to Bay City, that there was no improper inducement of Rick's cooperation and no improper pressuring of defendant, and that Rick had been adequately supervised. Thus, the court concluded that there had been no entrapment.

B

Defendant now argues, as he did below, that his Sixth Amendment right of confrontation was violated through the use of the mask because he was prevented from confronting his accuser face-to-face and because the trial judge, as the trier of fact, was prevented from adequately assessing the witness' credibility, a major issue in the entrapment hearing. Defendant also argues that his right of confrontation was violated when the trial court precluded cross-examination regarding identifying information.

The prosecution claims that the masking of its chief witness and the withholding of identifying information

did not violate the Confrontation Clause because an entrapment hearing is not a trial involving the ultimate issue of guilt or innocence.

In Michigan, the issue of entrapment is decided by the trial court, after a separate evidentiary hearing, rather than by a jury.[3] People v Jamieson, 436 Mich 61, 80; 461 NW2d 884 (1990); People v D'Angelo, 401 Mich 167, 176-177; 257 NW2d 655 (1977).

In D'Angelo, at 176, our Supreme Court explained that such a procedure does not violate a defendant's Sixth Amendment right to a jury trial:

> A court determination of entrapment does not deprive the defendant of the Sixth Amendment right to trial by jury. The focus of the entrapment inquiry under the objective test is upon the nature of the police conduct. The guilt or innocence of the defendant is irrelevant to that

> determination. A decision whether entrapment has occurred will involve the court's evaluation of the government conduct which resulted in the charges against the defendant. Should the court determine that the government did not engage in impermissible conduct, the guilt or innocence of the defendant will be decided by the jury.

Moreover, because a defendant who asserts an entrapment claim occupies an accusatorial posture, the burden of proving the charge properly may be placed on the defendant. Id. at 180.

However, in Kentucky v Stincer, 482 US 730; 107 S Ct 2658; 96 L Ed 2d 631 (1987), the United States Supreme Court considered a prosecutor's contention that the protections afforded by the Confrontation Clause could not extend to a pretrial hearing. In that case, the defendant argued that his exclusion from

the hearing to determine the competency of child witnesses violated his Sixth Amendment confrontation rights. Noting that the defendant was permitted under Kentucky law to move for reconsideration of the competency determination after the child witnesses testified at trial, the Supreme Court found that the defendant's rights under the Confrontation Clause had not been violated, given the opportunity for full and effective cross-examination during trial as a means of establishing non-competency to testify, as well as undermining credibility. Id. at 743-744.

We do not believe that the irrelevance of a defendant's guilt or innocence in resolving an entrapment claim renders the protections afforded by the Confrontation Clause inapplicable to an entrapment hearing. As we have already noted, the central concern of the Confrontation Clause is to ensure the reliability of evidence by subjecting it to rigorous testing in the context of an

adversary proceeding before the trier of fact. Craig, supra. While an entrapment hearing may not be a criminal prosecution involving the assessment of guilt or innocence, it remains, like a criminal trial, adversarial in nature and requires the resolution of factual issues by a trier of fact. Like at a trial, evidence is presented and testimony given.

We believe the interests involved in ensuring the reliability of evidence at a trial also apply to an entrapment hearing. Indeed, a defendant who claims entrapment, because he essentially concedes commission of the offense charged, is likely to view resolution of the entrapment issue more critically than he views a trial of his guilt or innocence. Further, unlike the situation in Stincer, a defendant in Michigan may not renew the entrapment issue at trial. Thus, to deny the protections afforded by the Confrontation Clause to a defendant at an entrapment hearing would be to deny

him the opportunity to ensure that the evidence presented against him, which may defeat his claim of entrapment and remove any impediment to a subsequent trial and conviction, "is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings." Craig, 111 L Ed 2d 678-679. Finally, we believe it would be fundamentally unfair, and contrary to principles of due process, to allow the state to present evidence designed to defeat a defendant's claim of entrapment and at the same time restrict the defendant's ability to effectively examine the reliability of such evidence.

Accordingly, for the foregoing reasons, we conclude that the protections afforded by the Confrontation Clause were available to defendant at the entrapment hearing as a means of ensuring the reliability of evidence submitted against him.

C

We must now decide whether defendant's confrontation rights were violated by the procedures employed at the entrapment hearing.

The United States Supreme Court has emphasized a defendant's right under the Confrontation Clause to a face-to-face meeting with witnesses appearing before the trier of fact. Coy v Iowa, 487 US 1012, 1016; 108 S Ct 2798; 101 L Ed 2d 857 (1988). The symbolic purposes served by such an encounter are explained in Coy, at 1017-1019:

> [T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as "essential to a fair trial in a criminal prosecution." . . .
>
> . . . A witness "may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting

> or mistaking the facts." . . . It is always more difficult to tell a lie about a person "to his face" than "behind his back." In the former context, even if the lie is told, it will often be told less convincingly. [Citations omitted.]

Thus, in Coy, the Supreme Court held that a defendant's right to a face-to-face confrontation was violated where a large screen was placed between the testifying witness and the defendant.

In Craig, however, decided after Coy, the Supreme Court reaffirmed the importance of face-to-face confrontation, but held that it was not an indispensable element of the right to confront one's accusers. Craig, 111 L Ed 2d 681. The Court held that the "preference" for face-to-face confrontation must occasionally give way to considerations of public policy and the necessities of the case. Id. Therefore, when necessary to further an important state interest,

"the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation." Id. at 686.

Thus, in Craig, the Supreme Court held that the defendant's confrontation rights were not violated in a child sexual abuse case where the child victim was permitted to testify outside the defendant's physical presence by one-way closed circuit television. The Court found that an important state interest was involved (protection of a child witness from trauma caused by testifying in the physical presence of the defendant), while also noting that the procedure employed preserved other important elements of the confrontation right, i.e., oath, cross-examination, and observance of the witness' demeanor. Id. at 682.

In the present case, the prosecution's chief witness was permitted to testify while wearing a mask that covered both his face and head.[4] Like the presence of a screen in Coy, a full-face mask tends to diminish the aspect of personalization associated with testifying about a defendant "to his face." Thus, it may very well make a witness "feel quite differently" than when he has to repeat his story while looking at the defendant. Moreover, to the extent that facts are distorted, they may be discerned more easily in a face-to-face confrontation.

It is suggested that the presence of threats against the witness justified the masking procedure in order to further an important state interest in promoting the safety of witnesses. We do not doubt that a state has a valid interest in promoting the safety of witnesses at criminal proceedings. Further, we agree that a trial court generally would be

justified in taking certain protective measures where evidence of threats or other reasonable concerns for a witness' safety are present. However, as Craig instructs us, the Confrontation Clause requires that any procedures devised to protect a witness must be tailored to preserve the essence of effective confrontation by ensuring the reliability of evidence in the face of rigorous adversarial testing.

As noted above, the procedure used in Craig (testimony by closed circuit television) was found to be adequate even though the witness did not have to testify while facing the accused, because it preserved other important elements of confrontation, i.e. oath, cross-examination, and observance of the witness' demeanor. In this case, however, while the presence of the mask appears to have allowed the witness to observe the defendant, it foreclosed the opportunity for the trier of fact to

adequately asses the witness' credibility through observation of demeanor.

In one of its earliest cases interpreting the Confrontation Clause, the Supreme Court noted that a primary object of the Confrontation Clause was to compel the witness "to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Mattox v United States, 156 US 237, 242-243; 15 S Ct 337; 39 L Ed 409 (1895).

Indeed, our own Supreme Court also has recognized the importance of demeanor evidence:

> Demeanor is of the utmost importance in the determination of the credibility of a witness. The innumerable telltale indications which fall from a witness during the course of his examination are often much more of an indication

> to judge or jury of his credibility and the reliability of his evidence than is the literal meaning of his words. [People v Dye, 431 Mich 58, 65; 427 NW2d 501 (1988).]

Moreover, as observed in United States v Walker, 772 F2d 1172, 1179 (CA 5, 1985), "The facial expressions of a witness may convey much more to the trier of facts than do the spoken words."

Here, there is no doubt that credibility was the major issue at the entrapment hearing. The defendant's testimony tended to show that he agreed to the drug sale only after being repeatedly pressured with persistent telephone calls, threats, and appeals to his sympathy and friendship. Such allegations, standing alone, were sufficient to establish entrapment. See Jamieson, supra at 89. Through its masked witness, however, the prosecution was able to refute each of the

defendant's allegations. Ultimately, the trial judge accepted the testimony of the masked witness over that of defendant in concluding that there had been no entrapment.

Because the masking of the prosecution's chief witness precluded the trial judge from adequately observing the witness' demeanor when testifying, we are constrained to find that the procedure of masking denied defendant a critical aspect of his confrontation rights. Craig, supra.

D

We also find that it was a violation of defendant's confrontation rights to completely preclude disclosure of identifying information.

The ability to identify and "place" one's accusers has been recognized as an important aspect of confrontation. In Smith v Illinois, 390 US 129; 88 S Ct 748; 19 L Ed 2d 956 (1968), the United States Supreme Court reversed the

conviction of a defendant accused of illegally selling narcotics when he was prevented from cross-examining the principal prosecution witness regarding his name or where he lived. The Supreme Court stated:

> [W]hen the credibility of a witness is in issue, the very starting point in "exposing falsehood and bringing out the truth" through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself. [Id. at 131.]

Also see Alford v United States, 282 US 687; 51 S Ct 218; 75 L Ed 624 (1931).

Trial courts do, however, have discretion to place limits on cross-examination where questions are intended merely to harass, annoy, or humiliate the witness, or where inquiries would tend to endanger the personal safety of the witness. See People v Paduchoski, 50 Mich App 434, 438; 213 NW2d 602 (1973).

In People v Pleasant, 69 Mich App 322; 244 NW2d 464 (1976), this Court discussed the underlying concerns relative to limiting cross-examination regarding identifying information, including the extent to which limitations can be imposed. Adopting the reasoning of the United States Court of Appeals for the Fifth Circuit in United States v Alston, 460 F2d 48 (CA 5, 1972), this Court held that the prejudice to be protected against is the prejudice resulting from a denial of the opportunity for the defendant to "place the witness in his proper setting."

Pleasant, supra at 327. Accordingly, reversal for failure to disclose certain identifying information will not be required under Smith or Alford, supra, where there is both sufficient reason for nondisclosure and the defendant is possessed of sufficient other information with which to place the witness in his proper setting, thus testing his credibility. Pleasant, supra at 327-328.

Here, while we agree that the trial court would have been justified in limiting cross-examination regarding identifying information in light of the alleged threats, it instead precluded all such cross-examination altogether. Moreover, while we note that defendant's testimony does suggest some familiarity with the witness' background, the trial court failed to make any findings regarding what information defendant possessed or whether defendant possessed sufficient information with which to "place the witness in his proper setting"

so as to enable further testing of credibility. Pleasant, supra. Absent such findings, the trial court's total foreclosure of identifying information "effectively emasculated" defendant's right of cross-examination. Smith, supra.

We reject the prosecution's claim that it was entitled to withhold the identity of its chief witness under the so called "informer's privilege." As explained in Roviaro v United States, 353 US 53, 59; 77 S Ct 623; 1 L Ed 2d 639 (1957), this privilege entitles the Government to preserve the anonymity of citizens who have furnished information concerning violations of the law to law enforcement officers, thus encouraging them to communicate such knowledge to the police. Even then, however, the privilege is not absolute:

> The scope of this privilege is limited by its underlying purpose.
>
> . . .

> . . . Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action. [Id. at 60-61.]

In the present case, the prosecution's witness was an actual participant in the underlying transaction, rather than a mere supplier of information. Moreover, his testimony was essential to a fair determination of the issue of entrapment. Thus, the informer's privilege does not apply.

E

In sum, we conclude that the masking of the prosecution's chief witness, as well as the complete

prohibition of disclosure of identifying information, violated the defendant's rights of confrontation. Accordingly, we hold that defendant is entitled to a new entrapment hearing, consistent with this opinion.

Despite our resolution of the entrapment issue, we still find it necessary to review the defendant's remaining issues on appeal.

II

Defendant argues that the trial court abused its discretion when it refused to accept his pretrial offer to plead nolo contendere to the charge of possession with intent to deliver 225 grams or more, but less than 650 grams, of cocaine. We disagree.

On June 23, 1988, defendant appeared before the trial court in connection with the prosecutor's offer to dismiss the conspiracy charge in exchange for a plea of guilty of the charge of possession with intent to deliver 225

grams or more, but less than 650 grams, of cocaine. Contrary to the prosecutor's offer, however, defendant insisted on pleading nolo contendere rather than guilty. When the prosecutor would not agree to such a plea, defendant elected to go to trial on both charges.[5]

Acceptance of a nolo contendere plea is a matter of grace, not of right. People v Lakin, 52 Mich App 437, 440; 217 NW2d 452 (1974). A defendant may enter a plea of nolo contendere only with the court's consent. MCR 6.301(B), formerly MCR 6.101(F). In this case, while the trial court had the discretion to accept a plea of nolo contendere to the charged offense of possession with intent to deliver 225 grams or more, but less than 650 grams of cocaine, Genesee Prosecutor v Genesee Circuit Judge, 391 Mich 115; 215 NW2d 145 (1974), it did not have the authority to accept such a plea, over the prosecutor's objection, in exchange for the dismissal of the conspiracy charge.

People v Heiler, 79 Mich App 714, 718; 262 NW2d 890 (1977). Accordingly, we find no error.

III

We now turn to consideration of defendant's trial-related issues.

First, with regard to the charge of possession with intent to deliver cocaine, the jury was instructed that it could find defendant guilty either as a principal or as an aider and abettor. Defendant contends that the evidence was insufficient to support a finding of guilt under one or both of these theories and argues, therefore, that the jury's failure to specify on which of the two theories its decision was based requires reversal. See People v Acosta, 153 Mich App 504, 510; 396 NW2d 463 (1986), citing People v Gilbert, 55 Mich App 168, 174; 222 NW2d 305 (1974).

In reviewing a claim of insufficient evidence, this Court views the evidence in a light most favorable to

the prosecution and determines whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. People v Petrella, 424 Mich 221, 268-270; 380 NW2d 11 (1985).

In this case, defendant argues that the evidence was insufficient to prove the element of possession, i.e., that he either possessed the cocaine or aided and abetted in its possession. We disagree.

Possession may be either actual or constructive, and may be joint as well as exclusive. People v Hill, 433 Mich 464, 470; 446 NW2d 140 (1989); People v Richardson, 139 Mich App 622, 625; 362 NW2d 853 (1984). Constructive possession may be found where a defendant knowingly has the power and intention to exercise dominion or control over a substance, either directly or through another, or if there is proximity to the substance together with indicia of control. Hill, supra. Circumstantial evidence and

reasonable inferences arising from the evidence are sufficient to establish possession. Richardson, supra.

The evidence presented at trial showed that defendant provided Officer Buczek with a sample of cocaine, participated in discussions regarding future sales, expressed interest in the denomination of the bills used to purchase the drugs, and told Officer Buczek that "we" do not like to keep the drugs and money in the room at the same time. When viewed in a light most favorable to the prosecution, there was sufficient evidence of both knowledge and indicia of control to enable the jury to find that defendant directly committed the crime of possession with intent to deliver 225 grams or more, but less than 650 grams, of cocaine.

We also find that the evidence was sufficient to convict defendant under an aiding and abetting theory. To aid and abet possession, there must be criminal

intent and direct or indirect acts or encouragement which aid that perpetration of the crime. People v Doemer, 35 Mich App 149, 152; 192 NW2d 330 (1971). The act or encouragement must be done knowingly with the intent to aid the possessor in obtaining or retaining possession. Id. In this case, although Stone was described as the "money man" and Wallace the person who left to get the drugs, defendant was the one who met Officer Buczek at the door, told the informant that the drugs were in the bathroom when they were not, and told Officer Buczek that they did not like to have the drugs and money in the room at the same time. A jury properly could infer from this evidence that defendant was acting to protect the possession of the drugs by his confederates and that his actions aided and assisted in the commission of the crime.

Accordingly, because the evidence was sufficient to support a finding of

guilt under each of the alternative theories, reversal is not required. Acosta, supra at 513.

Next, defendant argues that he was denied a fair trial because of instructional error. We disagree.

Although the trial court's instruction regarding reasonable doubt omitted the "moral certainty" language contained in former CJI 3:1:04 and CJI 3:1:05, the instruction was virtually identical to CJI2d 3.2(3), which no longer requires the "moral certainty" language. Read in its entirety, the instruction adequately presented the concept of reasonable doubt to the jury. See People v Jackson, 167 Mich App 388, 390-391; 421 NW2d 697 (1988).

Defendant also contends that instructional error occurred because the trial court failed to define the term "possession" for the jury. However, defendant did not request such an instruction at trial, and the absence of

such an instruction did not result in manifest injustice. Therefore, this issue has not been preserved for appeal. People v Kelly, 423 Mich 261, 272; 378 NW2d 365 (1985). Further, we find that the failure to request an instruction defining possession did not constitute ineffective assistance of counsel. People v Tommolino, 187 Mich App 14, 17; 466 NW2d 315 (1991).

Finally, the fact that defendant was not permitted to present his entrapment defense to the jury does not entitle him to reversal of his convictions. As noted previously, the issue of entrapment is decided in Michigan by the trial court in the jury's absence; a defendant is not then entitled to a "second bite at the apple" enabling the jury to second-guess the trial court's determination. D'Angelo, supra at 178.

IV

Next, defendant contends that the imposition of consecutive sentences for convictions of possession with intent to deliver cocaine and conspiracy to deliver the same cocaine violates the constitutional prohibitions against double jeopardy[6] and is contrary to the intent of the Legislature. Defendant further argues that his statutorily mandated twenty- to thirty-year prison terms constitute cruel and unusual punishment.

Among the protections afforded by the Fifth Amendment guarantee against double jeopardy is the protection against multiple punishment for the "same offense." People v Sturgis, 427 Mich 392, 398; 397 NW2d 783 (1986). This protection is designed to ensure that courts confine their sentences within the limits established by the Legislature. Id. at 399. While the term "same offense" applies to overlapping conduct

that violates more than one statute, the scope of double jeopardy protection against imposed multiple punishment for the same offense is confined to a determination of legislative intent. Id. at 399-400.

In People v Robideau, 419 Mich 458, 487; 355 NW2d 592 (1984), our Supreme Court identified some of the considerations relevant to a determination of legislative intent:

> Statutes prohibiting conduct that is violative of distinct social norms can generally be viewed as separate and amenable to permitting multiple punishments. A court must identify the type of harm the Legislature intended to prevent . . .
>
> A further source of legislative intent can be found in the amount of punishment expressly authorized by the Legislature. Our criminal statutes often build upon one

another. Where one statute incorporates most of the elements of a base statute and then increases the penalty as compared to the base statute, it is evidence that the Legislature did not intend punishment under both statutes.

While the controlled substance provisions of the Public Health Code are designed to protect society from the "patently harmful" effects of drug trafficking, see People v Gorgon, 121 Mich App 203, 206-207; 328 NW2d 619 (1982), the purpose of the conspiracy statute is to protect society from the "increased and special danger to society presented by group as opposed to individual activity." People v Carter, 415 Mich 558, 569-570; 330 NW2d 314 (1982). Thus, distinct social norms are involved. Further, the conspiracy statute, MCL 750.157a; MSA 28.354(1), provides for punishment equal to the

substantive crime; it does not impose a hierarchical, harsher penalty based upon the presence of aggravating factors. Additionally, in Carter, supra at 569, our Supreme Court stated:

> It is a settled principle of black-letter law that conspiracy is a crime that is separate and distinct from the substantive crime that is its object. LaFave & Scott, Criminal Law, Section 62, p 494; People v Tinskey, 394 Mich 108; 228 NW2d 782 (1975); People v Chambers, 279 Mich 73; 271 NW 556 (1937). The guilt or innocence of a conspirator does not depend upon the accomplishment of the goals of the conspiracy . . . . Thus, a defendant may be convicted and punished for both the conspiracy and the substantive crime. Pinkerton v United States, 328 US 640; 66 S Ct 1180; 90 L Ed 1489 (1946).

In light of the foregoing, we conclude that separate convictions and punishment for possession with intent to deliver cocaine and conspiracy to deliver cocaine do not violate double jeopardy protections. See also People v Velasquez, 125 Mich App 1, 3-4; 335 NW2d 705 (1983).

We also disagree with defendant's claim that the Legislature did not intend for separate punishments to be imposed consecutively. The express language of MCL 333.7401(3); MSA 14.15(7401)(3), pursuant to which consecutive sentencing was ordered, provides that "[a] term of imprisonment imposed pursuant to subsection (2)(a) . . . shall be imposed to run consecutively with any term of imprisonment imposed for the commission of another felony." We reject defendant's contention that this statute is ambiguous. See People v Mamon, 190 Mich App 124; __ NW2d __ (1991). Rather, pursuant to the plain language of the

statute, defendant's sentence for the separate and distinct felony offense of conspiracy was required to be consecutive.

Finally, defendant argues that the mandatory twenty- to thirty-year sentences required by MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii), in effect at the time defendant committed the instant offenses, constitute cruel and unusual punishment. While we reject defendant's cruel and unusual punishment argument, People v Marji, 180 Mich App 525, 542-543; 447 NW2d 835 (1989), we nevertheless vacate defendant's sentences, and in the event his convictions are affirmed on remand, we direct that he be resentenced under the amended sentencing provisions of the Public Health Code pursuant to People v Schultz, 435 Mich 517; 460 NW2d 505 (1990).[7]

V

In conclusion, we hold that defendant is entitled to a new entrapment hearing consistent with this opinion. We remand for this purpose. However, because defendant's jury convictions were properly obtained, these convictions shall be affirmed on remand if, after a new entrapment hearing, the trial court determines that defendant was not entrapped. In this event, defendant shall be resentenced in accordance with Schultz, supra. If, however, a new entrapment hearing is not held, or if the trial court determines after a hearing that defendant was entrapped, his convictions shall be reversed and the charges dismissed.

Remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Maureen Pulte Reilly

/s/ Barbara B. MacKenzie

/s/ Michael J. Connor

[1]Codefendant Stone also was charged with possession of less than fifty grams of cocaine. Additional charges of possession of less than fifty grams of cocaine, carrying a concealed weapon, and possession of a firearm during the commission of a felony also were filed against codefendant Wallace.

[2]A second confidential informant, who also was permitted to testify while wearing a mask, testified regarding the alleged threat. The witness claimed that while he was in jail with codefendant Wallace, he told Wallace that he knew Rick. After Wallace contacted codefendant Stone with this information, Wallace told the witness he would give him a quarter pound of cocaine if he had Rick "taken care of" and brought him a body part. The witness then contacted Stone to verify this information, and Stone told him, "You bring me his dick, you got a QP. I got it right here."

[3]This is contrary to the procedure of the federal system which, unlike Michigan, adheres to the subjective theory of entrapment, and allows the issue to be raised at trial and presented to the jury.

[4] Defense Counsel: I ask the record to reflect also that the witness is wearing a ski mask or some type of mask where his face and head are not visible.

The Prosecutor: That's correct.

The Court: It may so show.

[5] Defendant: Yes, I wanta plea [sic] nolo contendere.

The Court: Or else you'd rather go to trial.

Defendant: Trial, yes.

The Court: All right, then the prosecution doesn't wish to make that offer, so then we're left with no other choice than but to go to trial. Is that your desire.

Defendant: Yes. Yes.

[6]US Const Ams V, XIV; Const 1963, art 1, Section 15.

[7]Judges REILLY and MACKENZIE do not believe that Schultz constitutes binding precedent, inasmuch as only three members of the Supreme Court agreed on the basis for decision. People v Anderson, 389 Mich 155, 170; 205 NW2d 461 (1973). Further, they agree with the reasoning of the dissenters in Schultz, and thus, they do not believe that defendant is entitled to be resentenced pursuant to the amended version of Section 7401. Nevertheless, Judges REILLY and MACKENZIE acknowledge that, since Schultz was decided, the Supreme Court, in lieu of granting leave to appeal, has repeatedly vacated rulings of this Court and remanded for resentencing in accordance with Schultz. See People v Hamp, 437 Mich 865; 462 NW2d

589 (1990), and other cases reported at 437 Mich 865-867. Accordingly, in the interests of fairness and judicial economy, Judges REILLY and MACKENZIE reluctantly concur in the decision to grant resentencing in accordance with Schultz.

APPENDIX B

MICHIGAN SUPREME COURT

ORDER
Entered: February 7, 1992

92641 & (63)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,
Cross-Appellee,

v

MARTIN SAMMONS,

SC: 92641
COA: 115051
LC: 87-1554

Defendant-Appellee,
Cross-Appellant.

On order of the Court, the application for leave to appeal and the application for leave to appeal as cross-appellant are considered, and they are DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Boyle, J., states as follows:

I dissent from the order and would grant leave to appeal to determine whether the masking of a witness who testified under oath, in defendant's presence and subject to cross-examination violated defendant's right to confrontation where it is clear that the

identity of the witness was known to the defendant since defendant claimed entrapment by the witness. The Court of Appeals concluded that the Confrontation Clause applies fully to an entrapment hearing despite the irreducible literal meaning of the clause: "'a right to meet face to face all those who appear and give evidence at trial,'" Coy v Iowa, 487 US 1012, 1016 (1988), quoting California v Green, 399 US 149, 175 (1970) (Harlan J., concurring).

Moreover, it is well established that the Confrontation Clause reflects a preference for face-to-face confrontation, and thus a defendant's right physically to face those who testify against him is not absolute, even when it encompasses the irreducible literal meaning of the clause, Green, supra; Dutton v Evans, 400 US 74 (1970); Bourjaily v United States, 483 US 171 (1987). As the Supreme Court observed in Maryland v Craig, 497 US ___; 110 S Ct 3157, 3165; 111 L Ed 2d 666 (1990):

"Given our hearsay cases, the word 'confront,' as used in the Confrontation Clause, cannot simply mean face-to-face confrontation, for the Clause would then, contrary to our cases, prohibit the admission of any accusatory hearsay statement made by an absent declarant--a declarant who is undoubtedly as much a 'witness against' a defendant as one who actually testifies at trial."

To be sure, the elements of face-to-face confrontation encompass oath, cross-examination, and observation of the witnesses' demeanor. The Court in Craig, however, upheld a procedure which preserved all of the other elements of the right, but prevented a child witness from seeing the defendant as the witness testified at trial. The test is whether the procedure employed "adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded

live, in-person testimony." Maryland v Craig, supra, 110 S Ct 3166.

In the instant case, assuming that the entrapment hearing was a trial for purposes of confrontation analysis, see Kentucky v Stincer, 482 US 730 (1987), the only element of Confrontation Clause analysis that the procedure had an effect on was the trial court's ability to see the face of the witness. Defendant was present, the witness was subjected to cross-examination under oath, and there was confrontation in the literal sense. The opinion of the Court of Appeals is published and may have significant consequences for the protection of informant witnesses, as well as for the development of other innovative procedures which the state is able to demonstrate are necessary to further an important state interest.

Brickley and Riley, JJ., would grant leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

February 7, 1992 /s/ Corbin R. Davis
Clerk

APPENDIX C

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALAN MICHAEL STONE,

Defendant-Appellant.

October 3, 1991

No. 111978

Before: MacKenzie, P.J., and Reilly and Connor, JJ.

PER CURIAM.

Defendant pled guilty to possession with intent to deliver between 225 and 650 grams of cocaine. MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii). Defendant tendered his plea pursuant to a plea bargain arrangement wherein additional counts of conspiracy to deliver cocaine, and possession of less than fifty grams of cocaine were dismissed. In addition, defendant preserved his right to appeal an adverse trial court ruling on his claim of entrapment. Defendant was

sentenced to a mandatory term of twenty to thirty years of imprisonment. Defendant appeals as of right. We remand for proceedings consistent with this opinion.

Defendant's conviction resulted from his participation, along with codefendants Martin Sammons and James Wallace, in the same December 4, 1987, drug transaction reported in People v Sammons, __ Mich App __; __ NW2d (Docket No. 115051, rel'd __/__/91).

Defendant, Sammons, and Wallace all participated in a joint entrapment hearing in connection with their individual claims of entrapment. Like the defendant in Sammons, defendant Stone testified that a police agent informant, identified merely as "Rick," repeatedly contacted him, trying to persuade him to sell cocaine. Defendant said he declined several times, but that Rick kept calling both him and Sammons anyway. According to defendant, he finally agreed to help

Rick because of the persistent pressure from Rick and Sammons, and because of Rick's threat to "come down on all of us" if he did not cooperate. Rick was called as a witness by the prosecution. He denied pressuring or threatening either defendant or Sammons.

Consistent with our holding in Sammons, supra, we find that defendant's constitutional rights to confrontation were violated when "Rick," the prosecution's chief witness, was permitted to testify while wearing a mask, and without having to disclose his true identity. Moreover, because we find that defendant's allegations, in the absence of competent testimony to the contrary, were sufficient to establish entrapment, we conclude that defendant is entitled to a new entrapment hearing. Sammons, supra. Accordingly, we remand for this purpose.

If, following a new entrapment hearing, the trial court determines the

defendant was not entrapped, defendant's plea-based conviction shall be affirmed. If, however, a new entrapment hearing is not held, or if the trial court determines after a hearing that defendant was entrapped, his conviction shall be reversed and all charges dismissed.

We also vacate defendant's sentence, and, in the event defendant's conviction is affirmed on remand, he shall be resentenced pursuant to People v Schultz, 435 Mich 517; 460 NW2d 505 (1990).[1] We reject, however, defendant's claim that a mandatory term of twenty to thirty years of imprisonment for possession with intent to deliver between 225 and 650 grams of cocaine constitutes cruel and unusual punishment. People v Marji, 180 Mich App 525, 542-543; 447 NW2d 835 (1989). See also Harmelin v Michigan, 501 US __; 111 S Ct 2680; 115 L Ed 2d 836 (1991).

Remanded for proceedings consistent

with this opinion. We do not retain jurisdiction.

/s/ Barabara B. MacKenzie
/s/ Maureen Pulte Reilly
/s/ Michael J. Connor

[1] Judges Reilly and MacKenzie do not believe that Schultz constitutes binding precedent, inasmuch as only three members of the Supreme Court agreed on the basis for decision. People v Anderson, 389 Mich 155, 170; 205 NW2d 461 (1973). Further, they agree with the reasoning of the dissenters in Schultz, and thus, do not believe that defendant is entitled to be resentenced pursuant to the amended version of Section 7401. Nevertheless, Judges Reilly and MacKenzie acknowledge that, since Schultz was decided, the Supreme Court, in lieu of granting leave to appeal, has repeatedly vacated rulings of this Court and remanded for resentencing in accordance with Schultz. See, People v Hamp, 437 Mich 865 (1990), and other cases reported at 437 Mich 865-867 (1990). Accordingly, in the

interests of fairness and judicial economy, Judges Reilly and MacKenzie reluctantly concur in the decision to grant resentencing in accordance with Schultz.

APPENDIX D

MICHIGAN SUPREME COURT

ORDER
Entered: January 29, 1992

92636 & (77)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

SC: 92636
COA: 111978
LC: 87-001555-FH

ALAN MICHAEL STONE,
Defendant-Appellee.

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. The motion for bond also is considered, and it is DENIED.

Brickley, Boyle and Riley, JJ., would grant leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

January 29, 1992 /s/ Corbin R. Davis
Clerk